

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NICHOLAS KORDES and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, N.Y.

*Docket No. 96-631; Submitted on the Record;
Issued January 16, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that his back condition is causally related to factors of his employment.

On December 13, 1993 appellant, then a 43-year-old mailhandler, filed a notice of occupational disease and claim for compensation alleging that he sustained a herniated disc due to lifting heavy mail bags. Appellant indicated that he first realized his condition was caused or aggravated by his employment on November 20, 1993.

In support of his claim, appellant submitted several duty status reports completed by Dr. Stewart E. Gilbert in January 1981, in which the physician diagnosed low back syndrome secondary to radiculopathy and noted that appellant stated that he felt pain on January 5, 1981 while picking up mail bags from the floor. In addition, appellant submitted several more recent medical reports.

In nearly identical reports dated December 6, 1993, Drs. S. Shayani, an internist, and Victor Chehebar, a Board-certified neurologist and appellant's attending physician, noted that appellant was being treated for lumbar/sacral radiculopathy, disc herniation and thoracic radiculopathy, and that magnetic resonance imaging (MRI) of the lumbar spine taken on November 23, 1993 revealed a left-sided herniated disc at L5-S1. Both physicians concluded that appellant was totally disabled at the time.

In a report completed on December 7, 1993, Dr. Charles R. Dunbar, a Board-certified orthopedic surgeon, stated that he saw appellant on November 30, 1993 for evaluation of a herniated nucleus pulposus at L5-S1. He concluded that appellant had been totally disabled since November 23, 1993, and that he was now under the care of Dr. Chehebar.

Appellant also submitted a letter from the Department of Labor dated July 28, 1978 referencing a prior claim for a May 23, 1978 employment-related back injury. The letter

indicated by check mark that the facts supported appellant's contention that he sustained a traumatic disabling injury in the performance of duty, and further indicated that the claim had been approved for pain of the lower back.

In addition, appellant submitted a narrative statement dated December 13, 1993, in which he stated that his job as a mailhandler required him to lift bags weighing approximately 70 pounds onto a moving conveyor belt. He added that in order to perform this task he had to twist his body. Appellant further stated that on Saturday November 20, 1993 while he was at home, he started getting very severe pains in his lower back and legs, prompting him to call his physician.

By letter dated January 27, 1994, the Office of Workers' Compensation Programs requested that appellant submit additional factual and medical evidence in support of his claim including a physician's well-rationalized opinion regarding the causal relationship between his claimed back condition and factors of his employment.

In response to the Office's request, appellant submitted a narrative statement dated February 14, 1994 in which he clarified that his normal work days are Tuesday through Saturday, and that it was when he got home from work on Saturday, November 20, 1993 that he started getting severe back pain. Appellant stated that his "condition worsens" when he has to do the heavy lifting associated with his job, and added that he has had three other back injuries, in 1974, 1978 and 1981, while employed by the employing establishment

In addition, appellant submitted several medical reports pertaining to a 1981 back injury, which noted that appellant stated that he hurt his back while picking up sacks of mail. These reports do not contain a medical discussion regarding the cause of appellant's pain.

Appellant also submitted the results of his November 23, 1993 MRI which revealed a moderate sized left herniated disc at L5-S1.

A note dated January 14, 1994 from Dr. Chehebar released appellant to light duty and restricted him from lifting more than 15 pounds.

In a note dated February 14, 1994 from Dr. Shayani, the physician stated that he had treated appellant since November 23, 1993 and that appellant had a history of having sustained prior back injuries on February 26, 1974, May 23, 1978, and January 2, 1981, but unfortunately had not previously undergone an MRI, and therefore the extent of the damage from these injuries was unknown.

In a medical report dated March 14, 1994 from Dr. Mihai D. Dimancescu, a Board-certified neurological surgeon to whom appellant had been referred by Dr. Chehebar, the physician noted that the November 23, 1993 MRI revealed a large herniated disc, but that appellant reported that his radiating leg pain had stopped approximately two weeks after the injury. Dr. Dimancescu diagnosed a herniated lumbar disc at L5-S1 with resolving symptomology and recommended that appellant remain on light duty.

In a decision dated July 1, 1994, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to establish that appellant's back injury was causally related to factors of his employment.

By letter dated July 11, 1994, appellant, through his representative, requested an oral hearing.

At the hearing, held on February 27, 1995, in addition to asserting that appellant's back injury was employment related, appellant's representative asserted that appellant's claim should have been handled as a traumatic injury, not as an occupational disease, which would have entitled appellant to receive continuation of pay. Appellant's testimony with respect to this issue, however, was somewhat conflicting, in that he initially testified that his pain started after working on Saturday November 20, 1993, but later confirmed that he had informed the employing establishment that he was having lower back pain for approximately three weeks prior to that date. At the close of the hearing, at appellant's request, he was granted thirty days in which to submit additional medical evidence regarding the causal relationship between his back condition and his employment factors.

After the hearing, appellant submitted a March 13, 1995 medical report from his attending physician, Dr. Chehebar, in which the physician stated: "Patient due to lift[ing] 70 pounds [h]as resulted in disc herniation."

In a decision dated July 14, 1995, the Office hearing representative denied appellant's claim for compensation on the grounds that appellant failed to submit rationalized medical opinion evidence, based on a complete factual and medical background, establishing that his back condition was in any way causally related to the performance of his assigned employment duties. The hearing representative further found that appellant's claim had been properly handled as a claim for occupational disease.

By letter dated August 31, 1995, appellant requested reconsideration of the Office's July 14, 1995 decision. In support of his request, appellant submitted an August 14, 1995 medical report from Dr. Chehebar in which the physician stated, in pertinent part:

"My patient has had a full medical examination of his back and the results of his MRI shows that he does have a [d]isc [h]erniation.

"This shows that there is no doubt that my patient being a mailhandler having to left heavy mail bags weighing 70 pounds or heavier and having to do bending and twisting of his lower back, it did result in his disc herniation.

"This condition could only have happened since my patients occupation is a mailhandler."

In a decision dated November 28, 1995, the Office found the evidence submitted by appellant in support of his request for reconsideration was insufficient to warrant modification of the prior decision.

The Board finds that the case is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.²

However, proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.³

In support of his claim, appellant submitted several medical reports diagnosing his condition as a herniated disc at L5-S1, including reports dated March 13 and August 14, 1995 from his attending physician, Dr. Chehebar, in which the physician stated that appellant's employment duties, which included heavy lifting and twisting, had resulted in his disc herniation.

Although none of the medical reports of record, including those of Dr. Chehebar, contain sufficient rationale to discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that appellant's back condition is causally related to factors of his employment, they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.⁴ Additionally, the Board notes that in this case the record contains no medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case to an Office referral physician for a second opinion.

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion regarding whether appellant's back condition is causally related to his duties as a mailhandler. After such development as it deems necessary, the Office shall issue a *de novo* decision.

¹ 5 U.S.C. § 8101 *et seq.*

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *William J. Cantrell*, 34 ECAB 1223 (1983).

⁴ *Horace Langhorne*, 29 ECAB 820 (1978).

The decisions of the Office of Workers' Compensation Programs dated November 28 and July 14, 1995 are set aside and the case remanded for further action consistent with this decision.

Dated, Washington, D.C.
January 16, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member